

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT DURBAN)**

CASE NO: DA14/98

IN THE MATTER BETWEEN:

GILBEY DISTILLERS & VINTNERS (PTY) LTD APPELLANT

AND

MANDLA SHINGA

RESPONDENT

JUDGMENT

KROON JA:

- [1] The respondent was summarily dismissed from his employment with the appellant on the grounds that he had committed theft. He disputed the fairness of the dismissal. The compulsory charade of conciliation board proceedings came to an end on 1 November 1996. In terms of section 46(9)(b)(ii) of the Labour Relations Act No 28 of 1956 (“the Act”) any referral by the respondent of the dispute to the industrial court was required to be done by 30 January 1997. That step was in fact taken on 14 March 1997, i.e., the referral was forty-three days out of time. The appellant took the point that the industrial court accordingly had no jurisdiction to entertain the application. The respondent sought condonation of the late referral. The industrial court (per BOLTON AM) granted the application for condonation.

- [2] That grant is the subject of this appeal;
- [3] The first issue requiring decision is whether the order of the industrial court is appealable. Authority going in both directions was quoted during the debate at the Bar. In particular Mr VAN NIEKERK, for the appellant, relied on the decision of MYBURGH JP, sitting in the former Labour Appeal Court (Witwatersrand Local Division) in the matter of **Era Bricks (Pty) Ltd v Building Construction and Allied Workers Union and Others** (25 March 1997, unreported, appeal in case no. NH 11/2/2 5861). After a review of a number of authorities MYBURGH JP came down on the side of the view that an order such as that in issue **in casu** is appealable. Mr KHANYILE, for the respondent, very properly drew our attention to a further unreported judgment given by MYBURGH JP in the same court on 14 November 1997 in the matter of **African Commerce Developing Company v SACWU** (appeal in case no. 11/2/1 2964). The same issue arose in that case. MYBURGH JP held that his conclusion in the **Era Bricks** case was correct and he followed the same approach. Mr KHANYILE sought, however, to persuade us that these cases had been wrongly decided.
- [4] For reasons that will appear presently it is unnecessary to enter into this debate. I will assume, without deciding, that the order of the industrial court is appealable.
- [5] The principles applicable to the grant or refusal of condonation such as that in issue **in casu** were laid down in the case of **Melane v Santam Insurance Company Ltd** 1962

(4) SA 531 (A). In deciding whether good cause for condonation has been shown the court will look at, **inter alia**, the degree of lateness, the explanation therefor, the applicant's prospects of success on the merits and the importance of the case to him. Prejudice to the opposing party must be considered and weighed. At the end of the day the court, after having regard to all relevant considerations, makes a value judgment as to what would be fair to both parties.

[6] In essence the respondent's explanation for the late referral of the dispute to the industrial court was the following:

(1) After his internal appeal against his dismissal failed he instructed a firm of attorneys, Messrs Motloli Mdledle and Partners, to pursue the matter in the industrial court;

(2) Those instructions were given prior to the conciliation board proceedings; and everything was left by him in the hands of his attorneys;

(3) During February 1997 he called on his attorneys and was advised by Mr Mdledle that he would hand the matter over to Mr Shangase, of the respondent's present firm of attorneys, whom he described as "an expert on labour matters"; thereafter he, Mr Mdledle, would withdraw as the respondent's attorney;

(4) During March 1997 he attended on Mr Shangase. On 7 March 1997 the latter addressed a letter to Mr Mdledle. Therein, **inter alia**:

(a) receipt of certain documents forwarded by Mr Mdledle was acknowledged;

(b) the fact that the Act laid down certain time limits for referral of the matter to a conciliation board and thereafter to the industrial court was

recorded;

(c) by implication, copies of documents relating to such referrals were requested;

(5) He, the respondent, was unable to say why his erstwhile attorneys had, despite his timeous instructions, failed to refer the matter to the court **a quo** in time; it must, however, have been due to their ineptitude and negligence; had they acted promptly, a timeous referral would have been effected; it was through no neglect of his own that there had been a failure in that regard; he should not suffer for the neglect of his attorneys.

[7] Mr VAN NIEKERK advised us from the Bar that he would not be contending that the respondent did not have prospects of success on the merits. Similarly, the present is not a case where prejudice to the appellant is a consideration. Indeed, the allegation by the respondent in his affidavit filed in support of the application for condonation that the delay in referring the matter to the industrial court was unlikely to occasion the appellant any prejudice, was not placed in dispute by the latter. Further, Mr VAN NIEKERK did not seek to contest that the matter was one of importance for the respondent.

[8] What was argued was that the delay in question was inordinate and that the explanation tendered therefor was deficient, and that those factors, seen in the light of certain other considerations, were sufficient to non-suit the respondent in the matter of condonation.

[9] As to the sufficiency of the explanation it was contended that it was vague and lacking in particularity in material respects. Counsel pointed to

- the absence of information as to what occurred between the termination of the conciliation board proceedings and the respondent's visit to his attorneys during February 1997;
- the non-disclosure of the exact date in February 1997 on which the respondent reverted to his attorneys;
- the lack of an explanation why the respondent did not contact his attorneys in the interim;
- the lack of an explanation for the delay in consulting his new attorneys;
- the absence of an indication whether there was a response by the former attorneys to Mr Shangase's letter of 7 March 1997 and, if so, the content thereof;
- the absence of a supporting affidavit by Mr Mdledle or, alternatively, a statement that attempts to secure such an affidavit had proved fruitless.

The contention was that in the absence of a full and complete explanation it could not be said that none of the ineptitude or remissness that gave rise to the delay was to be attributed to the respondent or that he himself was sufficiently diligent in his claim.

[10] The nonchalant attitude by which the respondent's prosecution of the litigation in question was characterized, was, so counsel argued, further underlined by the fact that:

- a further period of 120 days, considerably in excess of the period provided for in the rules of the industrial court, elapsed before the respondent's statement

of case was filed in the court **a quo**;

- despite the appellant's response thereto - which in the first place took the point **in limine** that the respondent should be non-suited by reason of the late referral of the dispute to the industrial court - having been filed on 8 August 1997, the application for condonation was only filed on 4 March 1998, i.e., two days before the date of hearing.

These delays, which enjoyed no explanation in the papers, were, so counsel contended, additional relevant considerations militating against the court granting the respondent the indulgence of condonation.

[11] Counsel's submissions had considerable merit. At the end of the day, however, I am, for the reasons that follow, not persuaded that they should prevail.

[12] I agree that the delay of forty-three days was not insubstantial. I consider, however, that it is not properly to be categorised as having been so inordinate that by itself it merits the refusal of condonation.

[13] I agree further that the charge of lack of particularity in the respects contended for by counsel was validly levelled. However, in my judgment sight should not be lost of the following considerations:

(1) It may be safely assumed from the contents of the record that the respondent is an unsophisticated man who knew nought of the requirements of the rules of the industrial court; he was accordingly fully justified in leaving the matter in the hands of his attorneys;

he did give his attorneys timeous instructions.

(2) It is cause for comment that, as may be inferred from the papers, the respondent let more than two months go by after the termination of the conciliation board proceedings before he was in contact with his attorneys as to the progress of the matter; the effect thereof is in my view not to be overstated, however, and does not justify the respondent's being tarred with the brush of a lack of diligence sufficient to non-suit him;

(5) Some support for counsel's reliance on the absence of an affidavit from Mr Mdledle and of an indication that attempts to secure same did not meet with success, is to be found in the decision of this court in **Glansbeek v JDG Trading (Pty) Ltd** [1998] 3 BLLR 223 (LAC). In that case the applicant had engaged the services of a labour consultant (Mr Daniels). At issue was, **inter alia**, condonation for the defective and late filing of a notice of appeal and leave to lead further evidence on appeal. The applicant sought to lay the blame in respect of the notice of appeal and the failure to lead the evidence in question in the court **a quo** at the door of Daniels. It was held that the applicant ought, firstly, to have secured an affidavit from Daniels (to support the averment that it was he who had been negligent) or, alternatively, to have stated that unsuccessful attempts had been made to secure such an affidavit (which would have supported an inference that Daniels had been negligent) and, secondly, to have explained why in the first place he saw fit to engage the services of Daniels. The present case is, however, to be distinguished. Firstly, it cannot legitimately be required of a litigant to explain why he consulted a particular firm of attorneys; he can surely accept that the attorneys are proficient in the branch of the law involved, unless they indicate the contrary to him. In the present case, the

respondent's erstwhile attorneys did, albeit indirectly, indicate to him that labour law was not their forte (the statement that Mr Shangase was an expert in that field refers), but they did so only after the date for referring the dispute to the industrial court had come and gone. Secondly, the referral of the dispute to the industrial court would have been a relatively simple matter; the failure of Mr Mdledle to attend thereto in the circumstances justified the inference of ineptitude on his part or a negligent lack of diligence or both.

(4) The present is accordingly not a case where the respondent was personally at fault; and this is not a proper case where the litigant must be made to bear the results of his representative's negligence.

[14] The respondent's further delay in filing his statement of case is a relevant consideration. However, the rules make provision, where there has been such a delay, for the opposing party to apply for an order compelling the filing of the statement of case. That the appellant in this matter did not see fit to do. In the circumstances the delay in question is of little assistance to it.

[15] As to the delay in bringing the application for condonation, it is true that this Court, in common with the other courts of this country, has adopted the approach that an application for condonation should be filed as soon as the need to seek same arises. This Court has also required a failure to do so to be explained. **In casu** there was both a substantial delay and a failure to explain same. That does not, however, have the inevitable result that condonation must be refused. Delay in bringing an application for condonation and a failure to explain same are considerations to be put into the

melting pot. It need hardly be stated, however, that these issues do not, and cannot, bear the same importance as the delay for which condonation is sought and the explanation therefor.

[16] Mr VAN NIEKERK sought to stress that a refusal of condonation in this matter would not leave the respondent remediless. It would be open to him to seek appropriate redress from his erstwhile attorneys. That may be so, but this condonation cannot found a refusal of condonation where it should otherwise be granted.

[17] I place on record that despite the form of the discussion of the various relevant considerations set out above, my approach has not been a piecemeal one; I have had regard to a conspectus of the cumulative effect of all the circumstances.

[18] Applying a value judgment as to what would be fair to both sides I have come to the conclusion that condonation was properly granted by the industrial court in this case. Certainly, I have not been persuaded that the decision of the court **a quo** was wrong.

[19] The appeal is accordingly dismissed with costs.

KROON JA

I agree

NGCOBO AJP

I agree

CONRADIE JA

Appearances:

Appearing for the appellant: G.O. VAN NIEKERK instructed by Syfret Godlonton-Fuller Moore Inc.

Appearing for the respondent: S. KHANYILE of Mathe & Zondo

Date of Hearing: 24 February 1999

Date of Judgment: 09 March
1999

This judgment is available on the Internet at the following website: <http://www.law.wits.ac.za/labourcrt>.